87-1336

SUPREME COURT, U.S.
FILED
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CLERK

NO.

in the Supreme Court of the United States

October Term, 1988

GENE LEE BENNETT,

Petitioner,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE FLORIDA THIRD DISTRICT COURT OF APPEALS

Jesse C. Jones
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February 8, 1988

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QUESTION PRESENTED FOR REVIEW

WHETHER SECTION 24, PARAGRAPH FIFTH, OF THE NATIONAL BANK ACT, WHICH EMPOWERS THE DIRECTORS OF A NATIONAL BANK TO DISMISS BANK OFFICERS "AT PLEASURE," PRECLUDES A CONTRACTUAL PROVISION FOR REASONABLE SEVERANCE PAY.

PARTIES

Petitioner:

> Gene Lee Bennett, Defendant, Cross-Claimant, and Cross-Defendant in the trial court and Appellee in the Florida Third District Court of Appeal.

Respondent:

> International Bank of Miami, N.A., Defendant, Cross-Claimant, Cross-Defendant, and Appellant in the Florida Third District Court of Appeal.

Additionally, the following were parties in the trial court but not in the appellate court, and are not affected by this proceeding:

> Southeast National Bank, N.A., Plaintiff in the trial court.
>
> Alberto Gonzalez, a Defendant in the trial court who was dismissed and is no longer involved in these proceedings.
>
> Guillermo Rossel, a Defendant in the trial court who was dismissed and is no longer involved in these proceedings.
>
> Carlton Stewart, a Defendant in the trial court who is not involved in these proceedings.
>
> International Bank of Florida, Inc., a Defendant in the trial court who is not involved in these proceedings.

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OPINION BELOW

The opinion below is reported: *International Bank of Miami, N.A., vs. Bennett*, 513 So.2d 1294 (Fla. 3d DCA 1987).

STATEMENT OF GROUNDS FOR JURISDICTION

The Florida Third District Court of Appeal reversed the trial court's summary judgment in favor of Petitioner on October 23, 1986, and denied rehearing on November 9, 1987. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (1982). *See Williams v. Florida*, 399 U.S. 78, 80 n.5 (1970) (Florida District Court of Appeal highest state court from which a decision can be had).

STATUTE INVOLVED

The statute involved, 12 U.S.C. § 24, Paragraph Fifth (1982) provides as follows:

> Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—
>
> * * *
>
> Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

STATEMENT OF THE CASE

The International Bank of Miami, N.A. ("IBM"), employed Gene Lee Bennett as its president and entered into a written employment agreement in 1982 which provided for one year's severance pay in the event of a termination without cause. Bennett required this provision because of IBM's precarious financial condition. In 1983, IBM entered into an escrow agreement with Southeast Bank, N.A., and deposited one year of Bennett's salary in escrow to be paid to Bennett in the event of a termination without cause. In 1984, in connection with a sale of the bank, IBM terminated Bennett's employment without cause.

When IBM objected to releasing the escrowed funds to Bennett, Southeast Bank filed an interpleader action. Bennett and IBM cross-claimed against each other. Bennett's claim was based upon the escrow agreement which in turn was based on the employment agreement. IBM's claim was based, expressly and exclusively, on its assertion that both agreements were void because, IBM claimed, they violated Section 24, Paragraph Fifth, of the National Bank Act, 12 U.S.C. § 24 (1982).

The trial court entered a summary judgment in Bennett's favor. The court of appeal, however, reversed, and directed that a summary judgment be entered in favor of IBM, holding that Section 24, Fifth, denied Bennett his right to the bargained-for severance pay.

IBM raised the federal question in its cross-claim, in its motion for summary judgment, and in its opposition to Bennett's motion for summary judgment. The court of appeal expressly relied on its interpretation of the federal statute in ruling against Bennett.

ARGUMENT

The National Bank Act, 12 U.S.C. § 24, Fifth (1982), empowers a national bank's board of directors to appoint officers and to "dismiss such officers or any of them at pleasure, and to appoint others to fill their places." The state court below held that this statutory provision voided the bargained-for contractual provision between IBM and Bennett for severance pay.

Bennett respectfully submits that neither the language nor the intent of the statute supports this interpretation, and that if this misinterpretation is allowed to stand, national banks would be virtually crippled in their efforts to compete for high quality executive personnel. This Court should therefore accept jurisdiction to prevent the state courts from interfering with the operation of national banks by such an illogical interpretation of the National Bank Act.

The obvious intent of the statute is to give the directors of a national bank the ultimate and real authority to manage its affairs, and to prevent employees of the bank from interfering with the directors' discharge of their fiduciary duties by claiming a right to continued employment. The statute therefore makes any employment contract between a national bank and an officer terminable at will.

The statute does not, however, prevent national banks from entering employment contracts. Indeed, the regulations of the Comptroller of the Currency, 12 C.F.R. § 7.5220 (1982), expressly authorize employment contracts:

> The Board of Directors of a national bank, pursuant to paragraph 5 of 12 U.S.C., § 24, may enter into employment contracts with its officers and employees upon reasonable terms and conditions.

The parties here stipulated in the trial court that the terms of the severance pay provision were reasonable.

A provision for severance pay does not prevent (and did not prevent here) a termination at will. *See Rothenberg v. Lincoln Farm Camp, Inc.*, 755 F.2d 1017, 1021 (2d Cir. 1985); *Olsen v. Arabian American Oil Co.*, 194 F.2d 477 (2d Cir. 1952), *cert. denied*, 344 U.S. 817 (1952); *Annot.*, 40 A.L.R.2d 1044 (1955). The statute therefore does not preclude reasonable provisions for severance pay.

The state court below relied on decisions of other state courts holding that patently unreasonable severance pay provisions void under Section 24, Fifth.

In *Copeland v. Melrose National Bank of New York*, 241 N.Y.S. 429, 430 (1930), a bank vice-president's contract provided a three-year term and provided for payment upon termination of "liquidated damages . . . equal to the total compensation which he would receive thereunder for its unexpired period." The court ruled that "a contract for a definite term which forbids such discharge except under penalty of paying compensation for the full term violates [the National Bank Act] and is unenforceable." 241 N.Y.S. at 430.

In *Rohde v. First Deposit National Bank,* 497 A.2d 1214 (N.H. 1985), a bank vice-president had a three-year employment contract which provided that were he terminated for reasons other than fraud or forgery, he would receive another three years' salary. The court ruled:

> To hold on the one hand that contracts for employment of national bank officers cannot provide for guaranteed salaries for fixed periods of time in contravention of the bank's right to immediately discharge the officer, and on the other hand that such contracts can provide as a condition precedent to discharge that an officer is entitled to 36 months' salary, would be to elevate form over substance and render the language of 12 U.S.C. § 24, Fifth, meaningless.

In *Kemper v. First National Bank,* 418 N.E.2d 819 (Ill. App. 1981), the bank president sued to recover salary for the balance of his terminated employment contract, and not to collect under severance pay provision.

Other state courts have followed, albeit on distinguishable facts, the notion that "provisions in bank officers' contracts for a specified term of employment are void as against the public policy embodied in the federal statute." *Citizens State Bank of New Jersey v. Libertelli,* 521 A.2d 867, 868 (N.J. App. 1986); *see also Hawkins v. Peoples Federal Savings and Loan Association,* 399 N.W.2d 484 (Mich. App. 1986);

Alegria v. Idaho First National Bank, 723 P.2d 858 (Idaho 1986); *Bollow v. Federal Reserve Bank of San Francisco,* 650 F.2d 1093, 1097 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982); *Armano v. Federal Reserve Bank of Boston,* 468 F.Supp. 674 (D. Mass. 1979).

The logic of such decisions is that penalizing a national bank for exercising its power to discharge an officer "at pleasure" would improperly deter the use of such power (which did not happen here, because IBM terminated Bennett after having placed the severance pay in escrow). On the facts in those other cases, the results are understandable. For example, common law generally distinguishes "liquidated damages," which are properly recoverable, from penalties, which are not enforceable, by whether the sum agreed to is reasonable. *See* Restatement (Second) of Contracts § 356 (1981). Here, however, IBM stipulated that the amount of severance pay is reasonable.

Whatever limitations on the terms of employment for national bank officers may be implicit in Section 24, Fifth, should be enforced by the Comptroller, and not by a state court's voiding bargained-for contractual provisions. A long line of cases recognize that actions prohibited by the National Bank Act are "not void but voidable," and that "only the sovereign can object." *Langham's Estate v. American National Bank of Beaumont, Texas,* 165 F.2d 968, 970 (5th Cir. 1948); *National Bank v. Mathews,* 98 U.S. 621 (1878); *Kerfoot v. Farmer's and Merchant's Bank,* 218 U.S. 281 (1910); *Thompson v. St. Nicholas National Bank,* 146 U.S. 240 (1982); *National Bank v. Case,* 99 U.S. 628 (1878); *Noel Estate v. Commercial National Bank in Shreveport,* 232

F.2d 483 (5th Cir. 1956); *Federal Deposit Insurance Corp. v. Freudenfeld,* 492 F.Supp 763 (E.D. Wisc. 1980.)

In *First National Bank of Danville v. Reynolds,* 491 N.E.2d 218 (Ind. App. 1986), the Court held that Section 24, Fifth, of the National Bank Act did not preclude a provision in a bank president's employment contract guaranteeing payment of a stipulated sum should the president resign for cause. The court there rejected the bank's "form over substance" argument, quoting *Mitchell v. American Savings and Loan Association,* 593 P.2d 692 (Ariz. App. 1979):

> But it often happens that a blind and unreasoning application of a "general rule," in the absence of the circumstances it was intended to apply to, results in defeating rather than serving the interest of justice. . . . The proper function of rules is to serve the ends of justice. Conversely, where the circumstances are such that no such evil or any likelihood of it exists, the rule has no proper application. And this is true, a *fortiori,* where application of the rule would bring about an unjust and inequitable result.

IBM, and all other national banks, have power to terminate officers at will. IBM exercised that power here. Nothing about that power or its exercise should render unenforceable the reasonable, bargained-for provision for severance pay.

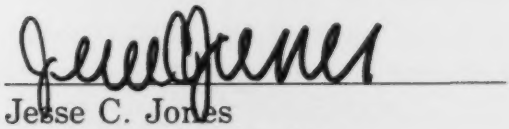
The interpretation of the federal statute by the state court below would prevent national banks from

competing on equal terms with other employers for high quality executive personnel. The question is one which this court can and should review by certiorari. *See Whitney National Bank v. Bank of New Orleans and Trust Co.,* 379 U.S. 411, 414-415 (1965).

CONCLUSION

This Court should issue a writ of certiorari to review the state court's interpretation of Section 24, Fifth, of the National Bank Act.

Respectfully submitted,



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February 8, 1988

Appendix

APPENDIX

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IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 84-16667 CA (30)

SOUTHEAST BANK, N.A.,

Plaintiff,

vs.

THE INTERNATIONAL BANK OF MIAMI, N.A., et al.,

Defendants.

SUMMARY JUDGMENT AWARDING INTERPLEADED FUND

THIS CAUSE came before the court, on September 26, 1986 and October 20, 1986, pursuant to the motion of The International Bank of Miami, N.A. for summary judgment, and on October 20, 1986, pursuant to the motion of Gene Lee Bennett for summary judgment, and the court having heard argument of counsel, having reviewed the memoranda of law submitted by counsel, and being otherwise fully advised in the premises, it is hereby

ORDERED AND ADJUDGED as follows:

1. The motion for summary judgment by The International Bank of Miami, N.A. is denied.

2. With respect to the entitlement to the $89,810.00 interpleaded fund in the registry of this court, the motion for summary judgment of Gene Lee Bennett is granted, and Bennett is hereby awarded the interpleaded fund, upon the grounds that he is entitled to said fund, pursuant to Paragraph II-A of his Employment Agreement.

3. The interpleaded fund of $89,810.00 in the registry of this court shall be placed in an interest-bearing account in a bank located in Dade County, Florida, mutually acceptable to the respective parties, to be withdrawn only upon the signatures of both Sara Soto, Esq., and David B. McCrea, Esq., and only upon the order of this court.

4. A stay of execution pending review is hereby entered by the court with respect to the payment of the $89,810 interpleaded fund and such fund shall remain in said interest-bearing account, until the conclusion of any Florida District Court of Appeal appellate proceeding, any Florida Supreme Court discretionary review or appellate proceeding, and any United States Supreme Court appellate or certiorari proceeding, in this matter, unless the parties otherwise agree in writing.

5. With respect to the monthly payments of $1,015.16, claimed by Mr. Bennett, pursuant to the Modification to his Employment Agreement, the motion for summary judgment by Gene Lee Bennett is denied.

6. This court's order of April 9, 1986 setting cause for jury trial and pre-trial instructions is vacated.

DONE AND ORDERED, in Chambers, at Miami, Dade County, Florida this 23 day of October, 1986.

/s/ MURRAY GOLDMAN
CIRCUIT COURT JUDGE

Copies furnished to:

David B. McCrea, Esq.
Sara Soto, Esq.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1987

CASE NO. 86-2898

THE INTERNATIONAL BANK OF MIAMI,

Appellant,

vs.

GENE LEE BENNETT,

Appellee.

Opinion filed September 15, 1987.

An Appeal from a non-final order from the Circuit Court for Dade County, Murray Goldman, Judge.

Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey and David B. McCrea and Gregory P. Borgognoni, for appellant.

Bailey, Dawes & Hunt and Jesse C. Jones, for appellee.

Before SCHWARTZ, C.J. and DANIEL S. PEARSON and JORGENSON, JJ.

PER CURIAM.

Both the facts and controlling authorities are thoroughly treated in Judge Jorgenson's opinion. We come to the opposite conclusion, however, as to the appropriate result. In our view, the arrangement under which the appellant was required to pay Bennett, at the termination of his employment, a year's salary for unrendered services is directly contrary to the untrammelled right to dismiss officers "at pleasure" conferred by paragraph fifth of the National Bank Act, 12 U.S.C. § 24 (1982). Rohde v. First Deposit Nat'l Bank, 127 N.H. 107, 497 A.2d 1214 (1985); Kemper v. First Nat'l Bank, 94 Ill. App. 3d 169, 418 N.E.2d 819 (1981); Copeland v. Melrose Nat'l Bank, 229 A.D. 311, 241 N.Y.S. 429 (1930), aff'd, 254 N.Y. 632, 173 N.E. 898 (1930). As these cases hold, the bank's purported obligation is therefore unenforceable as a matter of law. *Rohde; Kemper; Copeland.*

Contrary to the dissenter's analysis, it does not matter that the bank's payment, as mandated by the terms of the employment agreement, was to be effected through the device of a fund created by another piece of paper called an "escrow agreement." The substance, as opposed to the form, of the matter is that the escrow is distributable—and the bank is or is not out its 89,000-odd-dollars—according to the controlling provisions of an agreement which the dissent itself appears to acknowledge is invalid. To uphold Bennett's judgment as "really" stemming from the escrow, rather than the employment contract, "would be"—as was said in *Copeland* in an only slightly different context—"to countenance a patent subterfuge designed to circumvent the law." 229 A.D. at 313, 241 N.Y.S. at 430.

Finally, we certainly agree that to deny Bennett the fruits of the severance clause is to deprive him of a benefit, and relieve the bank of a burden, for which they both freely bargained. But that is in the very nature of a ruling declaring a contract invalid and unenforceable as contrary to the public policy established by Congress or the legislature. 4 Williston on Contracts §§ 602A, 615A (3d ed. 1961); 6A Corbin on Contracts §§ 1374-1375 (1962). In Ferguson v. Five Points Nat'l Bank, 187 So.2d 45 (Fla. 3d DCA 1966), we have already made a similar ruling—declaring unenforceable a bank extension of credit upon which a lender had specifically relied to to his great financial detriment—with respect to another element of the National Bank Act. We have no power to do otherwise in this case.

Accordingly the judgment under review is reversed for entry of one in favor of the appellant bank.

Reversed.

SCHWARTZ, C.J., and DANIEL S. PEARSON, J., concur.

The International Bank of Miami v. Bennett

Case No. 86-2898

JORGENSON, Judge, dissenting.

I respectfully dissent.

International Bank of Miami [International] appeals from an order of the trial court granting summary

judgment in favor of Gene Lee Bennett and awarding an interpleaded fund of $89,810 to Bennett.

International, a national banking association plagued by financial troubles, contacted an executive recruiter in New York to seek a new bank president. Following a national search, International, through its board of directors, selected Bennett, then president of a bank in New Jersey, to serve as its president for a term of three years, to run from June 7, 1982, to June 6, 1985. Prior to Bennett's acceptance of International's offer, the parties entered into negotiations for Bennett's compensation package. Bennett expressed his concern for the security of his position with International since acceptance would result in the relocation of his family from New Jersey to Miami as well as the resignation of his current lucrative post. International responded to Bennett's concern by agreeing to provide Bennett with one year's salary in the event of his premature termination. This provision was of critical importance to Bennett in deciding to accept the presidency of a troubled bank which might ultimately fail. Accordingly, the written employment agreement drafted by International provides for the payment of one year's salary to Bennett as liquidated damages and severance pay if Bennett's employment were to be terminated *without cause* prior to June 6, 1985. The severance payment clause of the employment agreement provides, in relevant part: "The Employee shall receive one year's salary payable in twelve (12) monthly installments as liquidated damages and severance pay only if his employment is terminated without cause by the Employer, regardless of the period of time remaining to be performed under this Agreement."

Shortly after the execution of the employment contract, International drafted a separate escrow agreement. This agreement details the procedure for the opening of an escrow account at Southeast Bank in order to set aside funds equal to the net current annual salaries of various bank officers, including Bennett. The agreement also sets forth the procedure for disbursement of the escrow funds. The escrow agreement provides that "[t]his agreement shall be construed in accordance with the laws of the State of Florida." Additionally, the escrow agreement contains a clause which provides that the escrow agreement has a separate existence apart from the employment agreement.[1] The plain language of the clause attests to the obvious intent of International to maintain the independence of the employment and escrow agreements. International subsequently funded an escrow account at Southeast Bank.

Predictably, International foundered. The bank was sold before the expiration of Bennett's term. The new board of directors of International terminated Bennett's employment without cause as of May 7, 1984. Bennett and International both made demand upon the escrow agent, Southeast Bank, for the escrow fund. On May 9, 1984, Southeast Bank filed an interpleader action

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[1]This clause reads as follows:

> 15. *No Effect on Employment Agreements.* This Agreement shall have no effect on the validity or enforceability of the written Employment Agreements between the Officers and the Bank, which are, and remain, in full force and effect.

against Bennett and International in order to determine their respective rights to the fund. International and Bennett filed cross-motions for summary judgment. At the hearing on these motions, International and Bennett stipulated that entitlement to the fund could be determined as a matter of law. International further stipulated that the amount of the interpleaded fund, representing Bennett's annual salary, was reasonable. The sole question before the trial court was to whom the interpleaded amount rightfully belonged.

International claims that the trial court erred in entering summary judgment for Bennett because the severance payment clause in the employment agreement is void and unenforceable under the National Bank Act, 12 U.S.C. § 24 (1982). The crucial provision of section 24 is the fifth paragraph which states that the board of directors of a national bank may dismiss any bank officer "at pleasure."[2] International argues that a severance payment clause violates this section because it restricts the ability of a board of directors to freely exercise its power to remove a bank officer "at

---

[2]The relevant portion of the National Bank Act provides:

> [A] national banking association . . . shall have power—
>
> * * *
>
> Fifth. To elect or appoint directors, and by its board of directors to appoint a president, vice president, cashier, and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places.

12 U.S.C. § 24 (1982).

pleasure" by virtue of imposing a penalty. In support of its position, International relies on a substantial body of law interpreting the fifth paragraph. In *Rohde v. First Deposit National Bank,* 127 N.H. 107, 497 A.2d 1214 (1985), a discharged officer of a national bank sought damages under his employment contract which had provided that if he were terminated without cause any time prior to the expiration of his three-year contract, he would receive as compensation the salary due him for those three years. The court affirmed the dismissal of his claim on the ground that such a contractual provision contravened the bank's right to immediately discharge the officer. The court in *Copeland v. Melrose National Bank,* 229 A.D. 311, 241 N.Y.S. 429, *aff'd,* 254 N.Y. 632, 173 N.E. 898 (1930), similarly refused to enforce a provision in a bank officer's employment contract requiring the bank to pay the remainder of the officer's salary for the unexpired period of his employment contract in the event of termination prior to the expiration of his contract. *See also Kemper v. First Nat'l Bank,* 94 Ill. App. 3d 169, 418 N.E.2d 819 (1981) (board of directors of national bank could dismiss officer before expiration of his stated tenure without incurring liability for breach of officer's employment contract). Although these cases disallow enforcement of severance payment clauses in the employment contracts of bank officers as violative of the National Bank Act, the cases are not dispositive of the question of Bennett's entitlement to the interpleaded escrow fund.

Bennett's right to enforce the severance pay provision in his employment contract is not at issue and thereby distinguishes the instant case from cases such as *Rohde* and *Copeland.* The only issue here concerns

Bennett's rights under the escrow agreement. The escrow agreement itself furnishes the basis for Bennett's claim to the fund. Unlike *Rohde* and *Copeland,* this case was before the trial court in the posture of an interpleader action. Significantly, this was not an action brought by Bennett to recover damages pursuant to his employment agreement with International.

I would hold, as did the trial court, that the interpleaded fund properly belongs to Bennett according to the plain language of the escrow agreement. Nothing in the National Bank Act prohibits a national bank from entering into an escrow agreement with a prospective employee. The creation of an escrow agreement and funding of an escrow account in order to attract a president of Bennett's caliber are not barred by the National Bank Act. Nor does the establishment of an escrow fund constitute a "penalty" which contravenes the "at pleasure" provision of the National Bank Act. Although Bennett could not require International to fund an escrow account, once International did so its board of directors and its successors were bound by its contract. After the escrow fund was set up, it could no longer be characterized as an asset of International.

Moreover, International, the drafter of the escrow agreement, envisioned the severability of the escrow agreement and its construction pursuant to Florida law notwithstanding any infirmities in the employment agreement. A party is bound by the language it adopts in an agreement no matter if the language may later prove to be disadvantageous. *Security First Fed. Sav. & Loan Ass'n v. Jarchin,* 479 So. 2d 767, 770 (Fla. 5th DCA 1985), *rev. denied,* 488 So. 2d 831 (Fla. 1986).

Where a contract is clear and unambiguous, the contract itself is the best evidence of the parties' intent, and the contract's meaning is a question of law for the court. *Jarr v. University of Miami,* 474 So. 2d 239, 242 (Fla. 3d DCA 1985), *rev. denied,* 484 So. 2d 10 (Fla. 1986).

It is clear that International voluntarily elected to establish the escrow agreement. But for the existence of the escrow account and agreement, Bennett would not have accepted the presidency of a bank with a troubled past and a tenuous future. International's reliance on *Ferguson v. Five Points National Bank of Miami,* 187 So. 2d 45 (Fla. 3d DCA 1966), is misplaced. In *Ferguson,* this court held that a holder of a note could not enforce the bank's promise to purchase the note where such a promise was without consideration as required by the National Bank Act. In this case, International received consideration in the form of Bennett's acceptance of its presidency for its agreement to establish an escrow fund. The trial court correctly concluded that the award of the interpleaded fund to Bennett did not unlawfully violate the "at pleasure" provision of the National Bank Act. To hold otherwise would completely ignore the obvious intent of the parties in agreeing to and establishing the escrow account and would sanction the attempt of International's new board of directors to evade a lawful commitment made by the predecessor board.

Contrary to the court's conclusion that upholding the escrow agreement would only amount to providing a patent subterfuge designed to circumvent the law, the escrow agreement, in my view, is a lawful contract binding on the successor board of directors. The

deposition of the appellee Bennett indicates that representatives of the office of the Controller of the Currency had reviewed both the employment contract and the escrow agreement during the course of a regular audit of the bank. Bennett testified that such agreements are an industry standard. Nothing in this record controverts that testimony. If such agreements were not to be enforced, it seems to me that during regular audits the Controller of the Currency would point out such a fact to bank directors and officers.

I would affirm.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

JULY TERM, A.D. 1987

MONDAY, NOVEMBER 9. 1987

CASE NO. 86-2898

THE INTERNATIONAL BANK OF MIAMI,

Appellant,

vs.

GENE LEE BENNETT,

Appellee.

Upon consideration, appellee's motion for rehearing is hereby denied.

A True Copy
ATTEST:
LOUIS J. SPALLONE
Clerk District Court of
Appeal, Third District

By /s/ Evelyn A. Hillman
Deputy Clerk

cc: David B. McCrea
Jesse C. Jones

/aeh

Supreme Court, U.S.
FILED
MAR 5 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1336

In the Supreme Court of the United States

OCTOBER TERM, 1987

GENE LEE BENNETT,

Petitioner,

vs.

INTERNATIONAL BANK OF MIAMI, N.A.,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of Florida, Third District

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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DESIGNATION OF CORPORATE RELATIONSHIPS

International Bancorp of Miami, Inc.
International Bancorp of Miami N.V.
Granvalour Holdings, S.A.

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SUMMARY OF ARGUMENT

The petition for certiorari should be dismissed because the named petitioner, Gene Lee Bennett, died eleven months before the petition was filed. The executor of Bennett's will was substituted for Bennett as a party in the Florida state trial court proceeding in October, 1987. Bennett, a deceased person, can not properly invoke this Court's jurisdiction.

Further, the petition demonstrates no grounds for discretionary review. The Florida court of appeal's decision is in accord with every other court addressing the validity of a severance pay provision or other contractual provision restricting a national bank's authority to discharge its officers at pleasure pursuant to 12 U.S.C. §24, Fifth. The Florida court of appeal, moreover, upheld the right, privilege or immunity under the National Bank Act asserted by The International Bank of Miami, N.A. This Court very rarely has granted certiorari when a right under the national banking laws has been upheld, rather than denied, by a state court.

The petition for certiorari does not demonstrate that the instant case merits discretionary review by this Court.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE DISMISSED BECAUSE PETITIONER DIED ELEVEN MONTHS BEFORE THE PETITION WAS FILED

The instant petition was purportedly filed on behalf of Gene Lee Bennett ("Bennett"). The petition fails to inform the Court, however, that Bennett died on March 8, 1987. Indeed, a motion for substitution was filed by Bennett's counsel in the Florida state trial court proceed-

ing and an order substituting the executor of Bennett's will in that proceeding was entered on October 27, 1987. (App. 2-6) Thus, the filing of the instant petition in Bennett's name is improper.

The certiorari jurisdiction of this Court has not properly been invoked. This Court's rules contemplate the filing of a writ of certiorari only by a "party." Sup. Ct. R. 19.1, .4. A deceased person cannot reasonably be considered a "party" who can properly invoke this Court's jurisdiction. *See Pennwell v. Newland,* 180 F.2d 551 (9th Cir. 1950) (deceased man has no privilege of appeal; appeal by non-existent person is neither unsubstantial "procedural irregularity" nor "harmless error").

This Court has dismissed petitions for certiorari when it was learned that petitioner had died. *Warden v. Palermo,* 431 U.S. 911 (1977); *Dove v. United States,* 423 U.S. 325 (1976); *see Kaipu v. Pinkham,* 206 U.S. 566 (1907) (appeal dismissed). The instant petition similarly should be dismissed. In *Palermo* and *Dove,* the petitioners were at least alive when the petitions were filed invoking this Court's jurisdiction.

Moreover, Rule 40 of this Court does not apply to permit substitution at this time. Rule 40 applies "[w]henever any party shall die *after* filing a notice of appeal to this Court or a petition for writ of certiorari . . . ." Sup. Ct. R. 40.1 (emphasis added). This Court's provisions for substitution of a party presuppose that the Court's jurisdiction was invoked by a proper and qualified appellant or petitioner, and not a deceased person.

Here, petitioner having died prior to the filing of the petition, an executor having been appointed and a motion for substitution having been made and granted in the trial

court, the deceased Bennett was not properly a "party" able to invoke this Court's certiorari jurisdiction.[1] The petition for certiorari to the Court of Appeal of Florida, Third District should be dismissed.

II. THIS COURT SHOULD NOT EXERCISE ITS DISCRETION TO GRANT CERTIORARI BECAUSE THE FLORIDA COURT JUDGMENT IS CONSISTENT WITH ALL OTHER RELEVANT AUTHORITY AND UPHOLDS THE ASSERTED FEDERAL TITLE, RIGHT, PRIVILEGE OR IMMUNITY

A. The Judgment Below is Consistent with Every Other Case Addressing §24, Fifth of the National Bank Act

The instant petition does not merit review in light of the considerations governing certiorari set forth in the Rules of this Court. The petition certainly does not demonstrate that the Florida court of appeal's judgment is "in conflict with the decision of another state court of last resort or of a federal court of appeals." Sup. Ct. R. 17.1(b). Indeed, the only two cases specifically addressing the validity of a severance pay provision respecting a discharged national bank officer are in accord with the Florida court of appeal. *Rohde v. First Deposit Nat'l Bank,* 127 N.H. 107, 497 A.2d 1214 (1985); *Copeland v. Melrose Nat'l Bank,* 229 A.D. 311, 241 N.Y.S. 429 (App. Div. 1930).

Similarly, courts are in agreement that any contractual provision that restricts a national bank board of directors'

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[1] The fact that the executor is not the petitioner raises questions as to the authority of Bennett's counsel to proceed with this petition and whether there is a proper "petitioner" involved against whom, for example, the Court may tax costs under Sup. Ct. R. 50.

right to discharge an officer with no liability under the contract is void under the National Bank Act, 12 U.S.C. §24, Fifth. *Kemper v. First Nat'l Bank,* 94 Ill. App. 3d 169, 418 N.E.2d 819 (1981); *Van Slyke v. Andrews,* 146 Minn. 316, 178 N.W. 959 (1920); *Alfano v. First Nat'l Bank,* 111 A.D.2d 960, 490 N.Y.S.2d 56 (App. Div. 1985).

Cases construing analogous federal or state statutes also are consistent with the Florida court of appeal's decision. *Bollow v. Federal Reserve Bank,* 650 F.2d 1093 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1982) (construing 12 U.S.C. §341, Fifth regarding discharge of Federal Reserve Bank officer); *Armano v. Federal Reserve Bank,* 468 F. Supp. 674 (D. Mass. 1979) (same); *Citizens State Bank v. Libertelli,* 215 N.J. Super. 190, 521 A.2d 867 (1986) (construing New Jersey state banking law by reference to 12 U.S.C. §24, Fifth); *Hawkins v. Peoples Fed. Sav. & Loan Ass'n,* 155 Mich. App. 237, 399 N.W.2d 484 (1986) (interpreting Federal Home Loan Bank Board-mandated bylaw, 12 C.F.R. §544.5, by reference to 12 U.S.C. §24, Fifth); *Roy v. Woonsocket Inst. for Sav.,* 525 A.2d 915 (R.I. 1987) (construing Rhode Island statute by reference to 12 U.S.C. §24, Fifth).

First National Bank v. Reynolds, 491 N.E.2d 218 (Ind. Ct. App. 1986), cited by petitioner, is not in conflict with the Florida court of appeal's judgment. In *Reynolds,* the court went to great lengths to distinguish the case from the situation in the *Copeland* and *Rohde* cases relied upon by the Florida court of appeal. The *Reynolds* court rested its decision solely on the fact that the officer in that case *resigned* for a specifically contemplated reason and was

not discharged, as was Bennett in this case. As the *Reynolds* court explained:

> The terms "dismiss" and "resign" are not synonymous, indeed they are antithetical .... Clearly, the terms are mutually exclusive.

491 N.E.2d at 222.

Without addressing the soundness of the *Reynolds* decision, it clearly is not in conflict with the Florida court of appeal's judgment.[2] As petitioner acknowledges, Bennett was discharged. The *Copeland — Rohde* line of cases control and are in accord.

B. Review by Certiorari is Rarely Granted When a Specially Set Up Federal Claim is Upheld

In the instant case, The International Bank of Miami, N.A. raised a defense founded upon the National Bank Act to Bennett's contractual claim to the interpleaded fund. The Florida court of appeal upheld the bank's federal law-based claim.

Historically, in cases where certiorari is sought under 28 U.S.C. §1257(3) (1948) based upon a claim of title, right, privilege or immunity under the national banking laws, this Court more readily has exercised its discretionary jurisdiction when the specially set up federal claim was denied by a state court. *See, e.g., Third Nat'l Bank in Nashville v. Impac Ltd.*, 432 U.S. 312 (1977), *aff'g* 541 S.W.2d 139 (Tenn. 1976); *National Bank of N. Am. v. Associates of Obstetrics & Female Surgery, Inc.*, 425 U.S.

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[2] *Mitchell v. American Sav. & Loan Ass'n*, 122 Ariz. 138, 593 P.2d 692 (1979), cited by petitioner, also has no pertinence to this matter given that the case was decided entirely under Arizona state law and did not even address the National Bank Act.

460 (1976), *vacating Associates of Obstetrics & Female Surgery, Inc. v. Apollo Prods., Inc.*, 542 P.2d 1079 (Utah 1975); *Michigan Nat'l Bank v. Robertson*, 372 U.S. 591 (1963), *vacating Hills v. Burnett*, 172 Neb. 370, 109 N.W.2d 739 (1961); *Yates v. Jones Nat'l Bank*, 206 U.S. 158 (1907), *rev'g* 74 Neb. 734, 105 N.W. 287 (1905); *Logan County Nat'l Bank v. Townsend*, 139 U.S. 67 (1891), *aff'g* 3 S.W. 122 (Ct. App. Ky. 1887).

The instant matter, where the federal claim was sustained and, indeed, where petitioner asserts that the federal issue should not control, is one that does not merit discretionary review. This is especially so where, as here, there is an established and consistent line of case law upholding the claimed federal title, right, privilege or immunity.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Court of Appeal of Florida, Third District should be dismissed or denied.

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Appendix

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In The Circuit Court of The 11th Judicial Circuit in and for Dade County, Florida

GENERAL JURISDICTION DIVISION

CASE NO.: 84-16667 (30)

FLORIDA BAR NO.: 265152

SOUTHEAST BANK, a national banking corporation,
Plaintiff,

vs.

THE INTERNATIONAL BANK OF MIAMI, N.A., a national banking association, GENE LEE BENNETT, ALBERTO GONZALEZ, GUILLERMO ROSSELL, and INTERNATIONAL BANK OF FLORIDA,
Defendants.

THE INTERNATIONAL BANK OF MIAMI, N.A., a national banking association,
Cross-Plaintiff,

vs.

GENE LEE BENNETT and CARLTON STEWART,
Cross-Defendants.

MOTION FOR SUBSTITUTION OF PARTY

Margaret E.S. Bennett, personal representative for the Estate of Gene Lee Bennett, respectfully moves this Honorable Court for an Order substituting her, as personal representative for the Estate of Gene Lee Bennett, as a party for Gene Lee Bennett in this action. As

grounds therefor, Mrs. Bennett would show unto the Court that:

1. Mr. Bennett has passed away. Mrs. Bennett has been appointed as personal representative for his Estate. Attached to this motion is a copy of the Court Order appointing her.

2. Mrs. Bennett therefore moves to be substituted, in her capacity as a personal representative for the Estate, as a party in place of Mr. Bennett.

Respectfully submitted,

BAILEY, DAWES & HUNT
a professional association
1390 Brickell Avenue
Penthouse
Miami, Florida 33131
Tel.: (305) 374-5505

By: /s/
Sara Soto

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this 22nd day of September, 1987, to David McCrea, Esq., Finley, Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey, 777 Brickell Avenue, Fifth Floor, Miami, Florida 33131.

/s/
Of Counsel

[INFORMATION NOT MATERIAL TO ORDER EXCLUDED]

Attorney or Party Without Attorney: *(Name and Address)*
JOHN R. VAN SICKLE
Attorney at Law Ste 220C
11858 Bernardo Plaza Court
San Diego, California 92128
Telephone No.: (619) 487-4011

Attorney for *(Name)*: Petitioner, Margaret E. S. Bennett
Superior Court of California, County of San Diego
Street Address: 220 West Broadway
Mailing Address: P. O. Box 128
City and Zip Code: San Diego, California 92112

State of (Name): Gene Lee Bennett, Decedent

ORDER FOR PROBATE

Order Appointing: ☒ Executor
☒ Order Authorizing Independent Administration of Estate
☒ with full authority

Date of hearing: 4-30-87 Time: 9:00 a.m. Dept/Rm: 21 Judge: Paul E. Overton

THE COURT FINDS

a. All notices required by law have been given.
b. Decedent died on *(date)*: March 8, 1987
☒ a resident of the California county named above
c. Decedent died ☒ testate and decedent's will dated: December 21, 1984 was admitted to probate by Minute Order on *(date)*: 4-30-87

THE COURT ORDERS

(Name): Margaret E. S. Bennett
is appointed
☒ Executor of the decedent's will

and letters shall issue on qualification.
☒ Full: Authority is granted to administer the estate under The Independent Administration of Estates Act.
☒ Bond is not required.

PAUL EUGENE OVERTON
Judge of the Superior Court

Filed Probate Division
April 30, 1987
Case Number: 143104
Robert D. Zumwalt, Clerk

In The Circuit Court of The 11th Judicial Circuit in and for Dade County, Florida

GENERAL JURISDICTION DIVISION

CASE NO.: 84-16667 (30)

SOUTHEAST BANK, a national banking corporation,
Plaintiff,

v.

THE INTERNATIONAL BANK OF MIAMI, N.A., a national banking association, GENE LEE BENNETT, ALBERTO GONZALEZ, GUILLERMO ROSSELL, and INTERNATIONAL BANK OF FLORIDA,
Defendants.

THE INTERNATIONAL BANK OF MIAMI, N.A., a national banking association,
Cross-Plaintiff,

v.

GENE LEE BENNETT and CARLTON STEWART,
Cross-Defendants.

AGREED ORDER SUBSTITUTING PARTY

THIS CAUSE came before the Court on the parties' agreement to the granting of Margaret E.S. Bennett's Motion For Substitution of Party, and the Court having reviewed the file, and being otherwise fully advised in the premises, it is hereby,

ORDERED AND ADJUDGED, as follows:

1. Mrs. Bennett's motion is granted.

2. Margaret E.S. Bennett, in her capacity as personal representative for the Estate of Gene Lee Bennett, is hereby substituted as a party for Mr. Bennett.

DONE AND ORDERED in chambers at Dade County, Florida this 27th day of October, 1987.

/s/
Circuit Court Judge

Copies furnished to:

David McCrea, Esq.
Sara Soto, Esq.